Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

77-
No. 907

BRUCE K. JORDAN, PETITIONER,

versus

U. S. NATURAL RESOURCES, INC.,
IRVINGTON MOORE DIVISION, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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PAGE

Questions Presented 1

Statement 2

Argument:

I. The Decision Of The Court Below Is Not In Conflict With The Decisions Of This Court 4

II. There Is No Conflict Among The Circuits Or Among The Courts With Respect To Any Issue Pertinent To This Case 7

III. The Action Of The Court Below, In Affirming The Findings And Judgment Of The District Court, Is In Accord With Applicable Principles Of Appellate Review And The Applicable State Law 9

Conclusion 14

TABLE OF CASES

	Page
C.I.R. v. Duberstein, 363 U. S. 278 (1960)	8
Easterlin v. Green, 248 S. C. 389, 150 S. E. 2d 473 (1966)	11
Galloway v. United States, 319 U. S. 372 (1943)	11
Houston Oil Co. v. Goodrich, 245 U. S. 440 (1918)	9
McAllister v. United States, 348 U. S. 19 (1954)	8
Porter v. Cook, 196 S. C. 433, 13 S. E. 2d 486 (1941)	12
Rice v. Sioux City Memorial Park Cemetery, 349 U. S. 70 (1955)	8
Rudolph v. United States, 370 U. S. 269 (1962)	9
Sarratt v. Holston Quarry Co. of S. C., 174 S. C. 262, 177 S. E. 135 (1934)	3, 5, 12
Southern Power Co. v. North Carolina Public Service Company, 263 U. S. 508 (1924)	9
United States v. Singer Mfg. Co., 374 U. S. 174 (1963)	8
United States v. United States Gypsum Co., 333 U. S. 364 (1948)	4, 5, 8
Yaun v. Baldridge, 243 S. C. 414, 134 S. E. 2d 248 (1964)	12
Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U. S. 100 (1969)	6

OTHER REFERENCES

Revised Rules of the Supreme Court of the United States, Rule 19	8
Federal Rules of Civil Procedure, Rule 52(a)	1

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QUESTIONS PRESENTED

Respondent respectfully submits that the Questions Presented herein should be stated as follows:

1. Whether the United States Court of Appeals for the Fourth Circuit by its opinion below departed from the proper standard of appellate review of findings by a District Judge in an action tried without a jury under Rule 52(a) of the Federal Rules of Civil Procedure?

2. Whether the findings and conclusions of the District Judge that petitioner was not engaged in a rescue of others at the time of the incident concerned and was barred from

recovery by reason of contributory negligence are without evidentiary support or the entire evidence of record productive of a definite and firm conviction that a mistake has been committed thereby?

STATEMENT

Petitioner brought suit against respondent in the United States District Court for the District of South Carolina, with jurisdiction based on diversity of citizenship and amount in controversy, to recover damages for personal injuries received when he stumbled and fell while attempting to carry a bucket of burning gasoline by means of a short stick which he had run through the bucket handle from a building where men were working. The bucket had been ignited by a spark from an acetylene torch being used in connection with work activities on a catwalk in the building. Petitioner alleged that the fire was caused by the negligence, recklessness and wantonness of respondent's agent and asserted that his actions in attempting to carry the bucket from the building concerned (a kiln) were in an effort to protect the other employees from serious injury.

The case was tried on May 12, 1975, before the District Judge without a jury. Considerable testimony was presented with respect to the circumstances existing at the time of the incident and bearing upon the question of whether the burning bucket of gasoline constituted any real threat or danger to other persons or to property and the question of the reasonableness of petitioner's asserted belief that the burning bucket of gasoline constituted an immediate danger of serious harm to other employees, necessitating their rescue.

On December 16, 1975, the District Judge issued his Findings of Fact, Conclusions of Law and Order directing entry of judgment for respondent (Petition App. pp. 13-18). The District Judge concluded that the respondent's

employee "may have been negligent" (Petition App. p. 16). However, he concluded further that the petitioner was guilty of contributory negligence in attempting to remove the burning bucket by use of only a short stick; that the petitioner's actions were unreasonable under the circumstances and he assumed any risk in connection therewith; and that the petitioner's contributory negligence barred him from recovery (Petition App. p. 16).

The District Judge found that the petitioner was not engaged in a rescue of other employees when he attempted to remove the burning bucket since the other employees were not in danger and were not calling for his assistance (Petition App. p. 15). He found further that the petitioner left a place of safety voluntarily and attempted to remove the five gallon bucket with only a two to three foot stick and attempted to remove the bucket not just from the vicinity of an oxygen tank which petitioner contended created a hazard, but all the way out of the building (Petition App. p. 15).

In connection with the petitioner's contentions regarding the necessity of rescue, the District Judge made additional findings that the petitioner's asserted anxiety was not shared by the other employees present and that they did not think the fire created an immediate danger to persons or property (Petition App. p. 15). The District Judge concluded that the "Rescue Doctrine" as applied in the South Carolina decision of *Sarratt v. Holston Quarry Co. of S. C.*, 174 S. C. 262, 177 S. E. 135 (1934), was not broad enough to cover petitioner.

Petitioner filed a timely Motion to Amend and Supplement the Findings of Fact, Conclusions of Law and Judgment (Petition App. pp. 19-24) seeking adoption by the District Judge of the conclusion that the fire and resulting injuries to the petitioner were caused by negligence, reck-

lessness, and wantonness of the respondent. That Motion was denied by the District Judge by his Order dated January 26, 1976 (Petition App. p. 25).

Upon appeal, the Court below reviewed the evidence and the findings of the District Judge, with particular reference to the contentions of the parties regarding the application of the "Rescue Doctrine" and affirmed the findings and judgment of the District Court resolving the issue of contributory negligence in favor of the respondent and its operation as a bar to recovery by the petitioner (Petition App. pp. 27-30).

Petitioner thereafter filed a Petition for Rehearing or Alternatively for Rehearing *En Banc* asserting, *inter alia,* that the Court of Appeals apparently misapprehended or overlooked petitioner's contention that the only reasonable conclusion to be drawn from the evidence was that respondent's agent was guilty not only of negligence but also of recklessness and that contributory negligence is not a defense to recklessness in accordance with the law of South Carolina (Petition App. pp. 31-37). That petition was denied by the Court below on November 7, 1977 (Petition App. p. 39).

ARGUMENT

I

The Decision Of The Court Below Is Not In Conflict With The Decisions Of This Court.

Petitioner's contention that the decision of the Court below is in conflict with the holding by this Court in *United States v. United States Gypsum Co.,* 333 U. S. 364 (1948), with respect to the standard of appellate review of findings in actions tried without a jury is without merit. When the opinion of the Court below is considered as a whole, it is apparent that the Court below followed the proper standard of review as set forth in *United States v. United States Gypsum Co.,* 333 U. S. 364 (1948), for determining whether findings are clearly erroneous. The Court of Appeals reviewed the evidence and determined that it raised issues of fact which under the evidence were properly resolved by the District Judge.

The Court of Appeals' independent evaluation of the evidence for substance and sufficiency is plainly evidenced by the Court's discussion of the factual issue regarding the reasonableness of the petitioner's conduct in the light of the "Rescue Doctrine" as applied by the South Carolina Supreme Court in *Sarratt v. Holston Quarry Co. of S. C.,* 174 S. C. 262, 177 S. E. 135 (1934). The Court of Appeals observed that the District Judge found that the facts in this case were much weaker than the facts in *Sarratt* and stated "we are inclined to agree with him" (Petition App. p. 30). In distinguishing the *Sarratt* case, the Court of Appeals stated: "There certainly was not the same obviousness of danger to human life in this case." (Petition App. p. 30). In further distinguishing that case with reference to the factual circumstance there existing of calls for help, the Court of Appeals noted: "Nothing like this was present in this case" (Petition App. p. 30).

It is therefore apparent that the Court of Appeals was not blindly accepting the District Judge's findings. It is further apparent that the Court of Appeals was not left with a "definite and firm conviction" that a mistake had been committed. Although the Court of Appeals did not specifically discuss the "clearly erroneous" rule, the decision is clearly in accord with the requirements of that rule as enunciated by this Court in *United States v. United States Gypsum Co.,* 333 U. S. 364, 395 (1948).

The statement by the Court below at the conclusion of its opinion that the District Judge had resolved the issue of contributory negligence and "we can no more reverse

his findings than could an appellate court disturb the jury's resolution of the similar question in *Sarratt*" (Petition App. p. 30) must be taken in the context of the previous language of the opinion which discloses a consideration of the evidence and underlying factual findings bearing upon the issue of contributory negligence. The quoted statement does not constitute an expression by the Court that it was restricting its review within the limitations applicable to review of the findings of a jury or giving the findngs a "conclusive" effect. The Court below compared the facts in the *Sarratt* case with the evidence in the present case and the quoted statement at the conclusion of its opinion amounts to no more than an expression of the Court's legitimate conclusion that the evidence was sufficient in this case to warrant resolution of the issue of contributory negligence by the District Judge. The Court of Appeals cannot be faulted for giving due deference to the District Judge's resolution of that issue. As stated by this Court in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U. S. 100, 123 (1969):

> "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*. The authority of an appellate court, when reviewing the findings of a judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence. . . ."

II

There Is No Conflict Among The Circuits Or Among The Courts With Respect To Any Issue Pertinent To This Case.

The petitioner's contention that this Court should grant *certiorari* in this case by reason of the existence of a conflict among the circuits and among the courts within specific circuits as to the scope of appellate review of findings of fact based on inferences from undisputed facts and in negligence cases is also without merit.

The existence of any conflict among the circuits or among the courts within specific circuits in connection with the scope of appellate review of findings of fact based on inferences from undisputed facts has no relevance to the situation presented in the instant case. A crucial factual issue in this case underlying the ultimate issue of contributory negligence was the applicability of the "Rescue Doctrine" to the actions of the petitioner. In that connection, the facts of rescue and reasonableness of the petitioner's asserted belief that there was immediate danger to others necessitating the plaintiff's action were highly disputed. It was petitioner's contention that he acted in apprehension of immediate peril and danger to the lives of other persons. Petitioner testified that he moved the gas because he was scared it would get in a nearby oxygen tank and "blow the men up" (Reporter's Transcript, p. 68 Joint Appendix in Court below, p. 105). The respondent, on the other hand, presented considerable testimony as to numerous circumstances contradicting that there was a rescue involved and the reasonableness of petitioner's asserted belief of immediate danger of serious injury to others as reflected in the findings of the District Judge and the opinion of the Court below.

It is therefore apparent that any supposed conflict regarding the scope of appellate review of findings of fact based on inferences from undisputed facts presents a question of purely academic interest insofar as this case is concerned. This Court has declared in Rule 19 of its Revised Rules that its discretionary power of review upon writ of *certiorari* will be exercised only when there are "special and important" reasons therefor. As stated by this Court in *Rice v. Sioux City Memorial Park Cemetery*, 349 U. S. 70, 74 (1955):

> ". . . 'Special and important reasons' imply a reach to a problem beyond the academic or episodic. . . ."

In any event, this Court has already expressly determined and stated that the "clearly erroneous" rule applies to "inferences drawn from documents or undisputed facts" [*United States v. United States Gypsum Co.*, 333 U. S. 364 (1948); *United States v. Singer Mfg. Co.*, 374 U. S. 174 (1963)] and to "factual inferences from undisputed basic facts" [*C. I. R. v. Duberstein*, 363 U. S. 278 (1960)]. Further, the holding of this Court in *McAllister v. United States*, 348 U. S. 19 (1954), plainly determined that a finding of negligence is reviewed under the "clearly erroneous" rule. Any continued conflict among the circuits or among the courts within specific circuits as to whether the "clearly erroneous" rule applies to review of such findings is simply unjustified. This Court should not be called upon to grant a writ of *certiorari* in this case merely to repeat the position it has taken in the past and from which it has never departed, particularly where, as here, the opinion of the Court below is in accord with the "clearly erroneous" standard as defined by this Court.

III

The Action Of The Court Below, In Affirming The Findings And Judgment Of The District Court, Is In Accord With Applicable Principles Of Appellate Review And The Applicable State Law.

We submit that none of the matters asserted by petitioner under the heading of the third reason advanced in his Petition for granting the writ presents any valid reason why this Court should grant *certiorari* in this case.

Petitioner's arguments pursue a course which would require this Court's analysis of the evidence for sufficiency. What the petitioner seeks by his Petition is to have this Court review the facts and evidence in this case and reverse the decision of the Court below by holding that the findings of the District Court were clearly erroneous and that the petitioner is entitled to judgment on the issue of liability as a matter of law. Respondent submits that this Court should not be called upon to exercise its discretion to grant a writ of *certiorari* for that purpose in this case, a diversity suit involving no question of special importance beyond the interests of the parties to the action. It has long been the declared policy of this Court not to grant a writ of *certiorari* for the purpose of reviewing evidence and questions of fact [*Southern Power Co. v. North Carolina Public Service Company*, 263 U. S. 508 (1924); *Houston Oil Co. v. Goodrich*, 245 U. S. 440 (1918)], or matters of no importance save to the litigants themselves [*Rudolph v. United States*, 370 U. S. 269 (1962)].

Moreover, the petitioner's argument with respect to the sufficiency of the evidence to support the District Judge's findings is patently unsound.

Petitioner argues that because of certain portions of the evidence selected by petitioner the "Sudden Emergency Doctrine" coupled with the "Rescue Doctrine" operated to

prevent a finding of contributory negligence and rendered that finding "without evidentiary support", or that the entire evidence is productive of the definite and firm conviction that a mistake has been committed in finding petitioner guilty of contributory negligence.

The fallacy of petitioner's argument is apparent from petitioner's erroneous characterization of all the evidence to which he refers as "undisputed facts" and the omission of any proper consideration of the considerable contradictory evidence introduced at the trial. Perhaps the most salient example of this basic error in petitioner's approach to the matter is the petitioner's assertion that it is an "undisputed" and "uncontroverted" fact that petitioner acted in attempting to carry the burning bucket "reasonably believing" that the men on the catwalk were in danger (Petition, pp. 6, 7).

The reasonableness of petitioner's asserted belief in a threat of immediate danger to the men working on the catwalk was clearly not an undisputed or uncontroverted fact. It was one of the basic disputed issues of fact in the case. Evidence contradicting the asserted reasonableness of such belief included, *inter alia*: (1) That no one was around the flaming bucket (Reporter's Transcript, p. 102, Joint Appendix in Court below, p. 65); (2) that the catwalk on which the men were working was twelve or thirteen feet above the ground (Reporter's Transcript, pp. 21, 53; Joint Appendix in Court below, pp. 17, 38); (3) that the floor of the building where the bucket was located when it ignited was a dirt floor (Reporter's Transcript, p. 23; Joint Appendix in Court below, p. 19); (4) that the bucket was about eight feet from the tanks containing oxygen and acetylene (Reporter's Transcript, p. 40; Joint Appendix in Court below, p. 25) and at least five or six feet from the hoses connecting the torch to the tanks (Reporter's Transcript, p. 103; Joint Appendix in Court below, p. 66); (5) that the tanks containing oxygen and acetylene would not have been harmed by heat unless subjected to heat of 500 to 600 degrees (Reporter's Transcript, p. 164; Joint Appendix in Court below, p. 97); (6) that one of the employees present at the time of the fire stayed at his workstation on the catwalk ladder and that the fire did not even excite him (Reporter's Transcript, pp. 63, 64; Joint Appendix in Court below, pp. 48, 49); (7) that another employee left the area because he was afraid of fire and was the closest to it, but was not concerned about explosion (Reporter's Transcript, pp. 54, 57; Joint Appendix in Court below, pp. 39, 42); and (8) that both of said employees assumed that the gasoline would have simply burned itself out if left alone (Reporter's Transcript, pp. 54, 55, 65; Joint Appendix in Court below, pp. 39, 40, 50). In addition, the evidence did not disclose that there were calls for assistance by anyone, that any of the persons present were injured or incapacitated, or that any equipment had been ignited.

There is nothing in this case contrary to the principles applied in *Galloway v. United States*, 319 U. S. 372 (1943), or *Easterlin v. Green*, 248 S. C. 389, 150 S. E. 2d 473 (1966), cited by petitioner. This case does not involve any reliance by respondent on speculation or the withholding of available evidence within the peculiar knowledge of respondent as referred to in *Galloway* or failure on the part of respondent to meet its burden of proof on the issue of contributory negligence.

It cannot be seriously questioned that petitioner's conduct without any justifiable excuse would constitute negligence. Petitioner asserted the application of the "Sudden Emergency Doctrine" and "Rescue Doctrine" to justify his conduct. Resolution of the factual issues concerned in the question of the application of those doctrines in respondent's favor supported respondent's case.

It could clearly be found by a preponderance of the evidence considered in its entirety that there was no "apparent immediate danger" as described in *Sarratt v. Holston Quarry Co. of S. C.*, 174 S. C. 262, 177 S. E. 135 (1934), or "sudden and imminent peril" as described in *Porter v. Cook*, 196 S. C. 433, 13 S. E. 2d 486 (1941), or reasonable belief in the existence of such a danger or peril on the part of petitioner, and that petitioner was contributorily negligent in taking the action he did. Furthermore, even if it should be assumed, *arguendo*, that there was such a danger or peril which reasonably prompted petitioner's action at the outset, it could clearly be found by a preponderance of the evidence that petitioner was contributorily negligent in any event by continuing to carry the flaming bucket with his vision becoming increasingly obscured by means of only a short stick far beyond the zone of the danger from which petitioner himself relied to justify his action. (Reporter's Transcript, p. 106; Joint Appendix in Court below p. 69). His negligence increased with every step he took.

Petitioner further asserts that the Court below did not decide or pass upon the question of whether the respondent was guilty of recklessness or wantonness as to which contributory negligence does not bar a recovery and that the evidence establishes as a matter of law that respondent's agent (Searcy) was guilty of recklessness.

It is noted in this connection that the same contention was presented to the Court below by petitioner's Petition for Rehearing which the Court below denied. In addition, the evidence clearly does not support a finding of recklessness on the part of respondent's agent as a matter of law. Recklessness is defined in *Yaun v. Baldridge*, 243 S. C. 414, 134 S. E. 2d 248 (1964), cited by petitioner, as follows:

> "'Recklessness implies the doing of a negligent act knowingly. When a man actually acts negligently and he realizes that he is acting negligently, the law says that he is reckless or wilful and wanton, whichever term you prefer, they all mean the same thing, that is, conscious failure to exercise due care.'"

There is no evidence to indicate a knowledge on Mr. Searcy's part of any likelihood that sparks from the acetylene torch used on the catwalk could reach the bucket of gasoline. In addition, Mr. Searcy had instructed employees who had been working with the gasoline to cover the bucket when they had finished (Reporter's Transcript, pp. 178-179; Joint Appendix in Court below, pp. 109-110). When Searcy was using the torch just prior to the outbreak of the fire, he thought that the employees had finished using the gasoline bucket, and that it would have been covered (Reporter's Transcript, p. 179; Joint Appendix in Court below, p. 110). It also appears from the Petition that the petitioner contends that the person placed most in jeopardy by the situation which existed was Searcy. It is illogical to assume that Searcy would have consciously placed himself in a position of jeopardy. The petitioner plainly did not prove the conscious failure to exercise due care required to compel a finding of recklessness as a matter of law.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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